United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL WITH PROOF OF SERVICE

75-7676

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UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

CHARLES AKNIN and AKNIN CORPORATION,

Plaintiffs-Appellants,

P/S

-against-

EDITH SIDEMAN, "JOHN DOE", "RICHARD ROE" and "THOMAS HOE",

Defendants-Appellees,

-and-

ARTHUR PHILLIPS, JR., ARMAND GIANUNZIO, JOSEPH NATARO, DANIEL NATCHES, EMILIO A. DE D'BRAMO, HENRY A. GRUSE, ANGELO C. MUSTICH, LOUIS LIFRIERI, THOMAS FORTE and MICHAEL ROTH,

Defendants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Preliminary Statement

This brief is submitted in reply to the brief of defendant-appellee Edith Sideman.

I. REPLY TO APPELLEE'S COMMENTS ON THE COMPLAINT

Appellee Sideman claims that "the complaint is a melange of irrelevancies, hearsay and unsupported conclusions of fact and law" (Br., p. 2) without setting forth one specific example of any such alleged defect. It is respectfully submitted that there are no "irrelevancies" or "hearsay" statements in the complaint. As for "unsupported conclusions of fact and law," it would appear to be well established that a good complaint should contain conclusory, rather than evidentiary, statements of fact. The few general statements of law in the complaint are merely intended to clarify plaintiffs' theory of recovery.

Sideman's next claim, that the complaint "sets forth no tenable or discernible theory of law" (Br., p. 2), is also devoid of specifics, although it seems to be somewhat amplified in the portion of her brief allegedly devoted to the issues on this appeal and will be dealt with in the response thereto.

At the end of her comments on the complaint, Sideman asserts that "its conclusory allegations with respect to malice, causation and conspiracy ... are insufficient and add no substance to the complaint" (Br., p. 3), and she cites Hoffman v. Holden,

268 F.2d 280 (9th Cir. 1959).

There are several answers to this assertion. First of all, Sideman's motion and plaintiffs' opposition thereto do not stand or fall on the allegations in the complaint, since the Sideman motion is for summary judgment and encompasses all of the statements and allegations in the affidavits submitted on that motion, and, it should be added, Sideman's failure to deny or even to respond personally to the statements and allegations in plaintiffs' affidavits concerning the active and knowledgeable part Sideman played in the proceedings which put an end to plaintiffs' profitable business.

Secondly, the allegations of "malice, causation [and] conspiracy" in the complaint are by no means unsupported by factual details either in the complaint or in plaintiffs' affidavits. The complaint clearly describes the malice that motivated Sideman and the defendants and the nature and scope of their concerted action against plaintiffs. Thus, it alleges that Sideman and the other defendants resented the presence in their village of the patrons of plaintiffs' discotheque, who were of a different ethnic, social and economic class; that they thereupon determined and planned to rid themselves of these outsiders by closing down the

plaintiffs' discotheque; and that they did so by invoking ordinances which they knew or had good reason to know were invalid, and by invoking one of those ordinances against plaintiffs in an invidiously discriminatory manner, for the sole purpose and with the deliberate intention of putting plaintiffs out of business.

Lastly, on this subject, the Hoffman case cited by Sideman hardly supports her general comments concerning the complaint. The decision of the Circuit Court in the cited case reversed the summary determination of the District Judge that the complaint therein had failed to state a cause of action under the Civil Rights Statutes. In doing so, the appellate court made the following observations:

> "[Plaintiff] also alleges the 'defendants conspired.' In what other way can plaintiff plead conspiracy? Certainly he is not required to list the place and date of defendants' meetings and the summary of their conversations" (268 F. 2d 280, 294-295).
>
> * * *
>
> "We think the validity of the complaint at the pleading stage cannot be disposed of on the basis of the presence of so-called 'conclusionary' allegations of 'conspiracy' or 'conspiring' or 'discriminatory intent' or of 'acting under color of state law or authority' but that as to these elements of a cause of action such allegations are proper and necessary" (268 F. 2d 280, 295).

Perhaps the most pertinent holding in the Hoffman case, on which Sideman relies, is that a question not briefed or considered in the District Court will not as a general rule be considered by a Circuit Court of Appeals (268 F.2d 280, 285, footnote 1; see also Terkildsen v. Waters, 481 F.2d 201, 204 [2d Cir. 1973]). The fact is that none of the issues raised in Sideman's brief on this appeal concerning the alleged insufficiency of the complaint were raised or briefed by Sideman in the District Court, or considered or passed upon by that court.

II. REPLY TO APPELLEE'S STATEMENT OF FACTS

In her brief, Sideman adopts the statement of facts in the opinion of the District Judge. The defects in that statement are fully covered in plaintiffs' initial brief, and require no further comment here.

III. REPLY TO APPELLEE'S STATEMENT OF THE ISSUES

Sideman begins what is purportedly her statement of the issues in this case by challenging the accuracy of plaintiffs' statement that she "participated" in the proceedings against plaintiffs under the "unnecessary noise" ordinance. She calls

plaintiffs' allegation that it was she who called the police on every single occasion on which the latter served plaintiff Aknin with a summons an "unsupported allegation," but the fact is that it is stated under oath in Aknin's affidavit, it was not denied in any affidavit or other document submitted by Sideman or by her attorney in the District Court, and it is not even denied in Sideman's present brief! Under any rational standard of pleading or proof, it must be deemed to be admitted.

> "Furthermore, when the factual allegations in the pleadings of the party opposing summary judgment are supported by affidavits or other evidentiary material, they must be taken as true in ruling on the motion" (First National Bank of Cincinnati v. Pepper, 454 F.2d 626 [2d Cir. 1972]).

But, says Sideman, she as "a private citizen had no power, jointly with public officials or otherwise, to institute or maintain such proceedings" (Br., p. 4). This particular claim would appear to be contrary to New York criminal procedure which allows certain less serious criminal proceedings to be instituted on the complaint of a private citizen. The fact that the proceedings against plaintiff Aknin under the "unnecessary noise" ordinance were instituted on the formal complaint of a police officer responding to Sideman's call, merely corroborates the

existence of a concerted effort between Sideman and the defendant public officials.

The essential defect, however, in Sideman's argument based on her alleged lack of power to institute a proceeding against plaintiff Aknin under the "unnecessary noise" ordinance is that it misses plaintiffs' main point in their case against Sideman and the other residents who were part of the concerted effort against plaintiffs. Plaintiffs have asserted that Sideman and the other defendant residents were responsible for making the defendant public officials proceed against plaintiffs. In his opinion and decision, the District Judge assumed that to be the fact (A34), and in Sideman's brief she adopts the District Judge's statement of the facts (Br., p. 4). This being so, Sideman and the defendant residents are as responsible -- indeed more responsible -- than the defendant officials for all proceedings taken against plaintiffs.

Sideman's claim that "plaintiffs nowhere allege an overt act on the part of defendant Sideman" (Br., p. 4) is equally specious. Plaintiffs repeatedly allege in their complaint and in their affidavits in opposition to Sideman's motion for summary judgment that her calls to the police brought about every single proceeding against plaintiffs under the "unnecessary noise" ordi-

nance, and Sideman has yet to deny that allegation in any manner. Those calls alone are clearly "overt acts" sufficient to link her to the action taken against plaintiffs.

In addition to those calls, plaintiffs have repeatedly alleged that Sideman took part in public and private meetings in which she sought (successfully, the District Judge -- and now Sideman -- concede) to persuade the defendant public officials to take the action they ultimately took against plaintiffs.

Most important of all, however, are plaintiffs' repeated allegations that Sideman was a member of a conspiracy that included the defendant public officials, so that all of their "overt acts" against plaintiffs are attributable to her. As the Circuit Court stated in Hoffman v. Holden, cited and relied upon by Sideman --

> "If sufficient allegations appear of the acts of one defendant among the conspirators, causing damage to plaintiff and the act of the particular defendant was done pursuant to the conspiracy, with the requisite purpose and intent and under color of state law, then all defendants are liable for the acts of the particular defendant under the general principle of agency on which conspiracy is based" (268 F.2d 280, 285-286; plaintiffs' emphasis).

As in the concluding part of her comments on the

complaint, so at the conclusion of her statement of the issues on this appeal, Sideman, for the first time, alludes to issues not presented to or considered by the District Judge, thus compounding her violation of the procedural rule to the contrary (Hoffman v. Holden, supra; Terkildsen v. Waters, supra). Yet she now has the temerity to say that plaintiffs have not met their alleged "burden of proof" on these tardily raised issues!

Sideman asserts that plaintiffs have failed to show that the action against them was taken "under color of law," and that they have otherwise failed to state a claim under the Civil Rights statutes, once again without specifying how or why, and this time citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S. Ct. 1598 (1970), and Jackson v. Hepinstall, 328 F. Supp. 1104 (N.D. N.Y. 1971).

Since she cannot possibly mean that plaintiffs have failed to show that the defendant public officials acted under "color of law," she can only be repeating in another form her argument that, as a private citizen, she cannot be charged with a violation of the Civil Rights statutes. Here, too, however, the very case that she cites, Adickes v. S. H. Kress & Co., supra,

is conclusive authority against her argument:

> "Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute [42 U.S.C. § 1983]. To act "under color" of law does not require that the accused by an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,' United States v. Price, 383 U.S. 787, 794 (1966)" (398 U.S. 144, 152; plaintiffs' emphasis; see also the cases cited on p. 15 of plaintiffs' initial brief on this appeal).

It is difficult to understand either of Sideman's citations. In Adickes, supra, the Supreme Court reversed a District Judge for granting summary judgment in favor of the defendant on one count under the Civil Rights statutes, and for directing a verdict under another count. In Jackson v. Hepinstall, the other case Sideman cites to support her argument that plaintiffs have failed to state a claim under the Civil Rights statutes, the District Judge dismissed the complaint primarily because the plaintiff had not exhausted state administrative remedies, a ruling which would appear to be contrary to the later Supreme Court decision in Allee v. Medrano, 416 U.S. 802, 94 S. Ct. 2191, 40 L.Ed.2d 566 (1974).

Sideman's argument that plaintiffs have failed to state

a claim under the Civil Rights statutes appears to be based solely on the proposition that neither she nor the defendant public officials could have had knowledge that the ordinances they invoked against plaintiffs were invalid because of the "strong presumption of constitutionality" and the alleged fact that the ordinances' "constitutionality" had never been tested in court (Br., p. 5). Among other things, this argument overlooks the critical fact that plaintiffs' case by no means rests on such "constitutionality" or lack of it.

Plaintiffs do not only claim that the two ordinances invoked against them were patently invalid, and known to be so by Sideman and her fellow defendants; they assert with equal force that even if the "cabaret" ordinance was valid, its use against them was a clear case of selective prosecution or invidiously discriminatory enforcement of the law. It would now appear to be well established that an action may properly be brought under 42 U.S.C. § 1983 for selective prosecution of a single individual (as well as a class), if the facts disclose such improper prosecution. Moss v. Hornig, 314 F.2d 89 (2d Cir. 1963); United States v. Berrios, 501 F.2d 1207 (2d Cir. 1974); 227 Book Center, Inc. v. Codd, 381 F. Supp. 1111 (S.D. N.Y. 1974); see also People v. Acme Supermarkets, 37 N.Y.2d 326, 372 N.Y.S.2d 590 (1975).

It is true that in Moss v. Hornig, this Court affirmed a dismissal of the complaint, but it did so on the particular facts of that case, brought out at a hearing held by the District Judge. In so doing, however, this Court made clear that it would sustain a claim of selective prosecution in an action under § 1983 in a proper case. Plaintiffs submit that, if ever there was one, this is such a case. Beyond that, they note that unlike the situation in Moss, there was no hearing on the issue of selective prosecution in this case in the District Court; indeed the issue was never even considered or passed upon by the District Judge, for the simple reason that it was never raised or briefed by Sideman. Thus, this is a particularly appropriate case not only for the application of the reasoning in Moss, but also for the procedural rule in Terkildsen v. Waters, supra, barring consideration by this Court of issues not raised or briefed in the District Court.

Returning to Sideman's argument based on the "presumption of constitutionality," it remains to be noted that no such presumption is referred to in either of the cases she cites in support of her argument (Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S. Ct. 987 [1962], and Oriental Boulevard Co. v. Heller, 27 N.Y.2d 212, 219, 316 N.Y.S.2d 226, 230, app. dism'd.,

401 U.S. 986, 91 S. Ct. 1234 [1971]. Moreover, if there is any such presumption, it merely is a factor to be taken into account in determining whether defendants acted with malice when they invoked the ordinances in question in this case. Plaintiffs submit that two facts of record relating to the "unnecessary noise" ordinance demonstrate that there is at least an issue of malice in this area.

As noted in plaintiffs' affidavits, the "unnecessary noise" ordinance had virtually been ruled unconstitutional by the Village Court of Mamaroneck in a case immediately preceding that against plaintiff Aknin (People v. Daley, cited on p. A25 of plaintiffs' appendix), and a substantially identical ordinance had previously been struck down by the New York Supreme Court, Suffolk County, in Village of Southampton v. Tekworth, 69 Misc. 2d 291 (1972; cited at A44).

Thus Sideman's statement that "the record reveals no definitive determination of either of these local laws" (Br., p. 5) is misleading, if not false. Her subsequent argument based on the proposition that "[i]mplicit in [plaintiff Aknin's] convictions [in the Village Court] is a judicial finding of constitutionality and validity of the subject ordinances" (Br., p. 5) is equally defective.

This Court is not bound by a determination of the Village Court of Mamaroneck concerning the validity of an ordinance under the United States Constitution. Moreover, the determination of the Village Court came after defendants had moved against plaintiffs, so that it can hardly be used to prove that defendants acted without malice -- i.e., without believing that at least the "unnecessary noise" ordinance was unconstitutional on its face.

As plaintiffs read this Court's opinion in Brault v. Town of Milton, No. 74-2370 (Oct. 1, 1975), it clearly implies that an action may be brought under the Civil Rights statutes (if not directly under the Fourteenth Amendment) for the implementation, with malice, of an invalid ordinance which deprives a citizen of a valuable property. Once again, plaintiffs submit that this is just such a case, or that at the very least there is a substantial question (of fact) here concerning the malice of defendants. In addition, plaintiffs once again submit that this question was not raised or brief in the District Court.

IV. REPLY TO APPELLEE'S ARGUMENT

By the time Sideman reaches the point in her brief which she entitles "Argument," she has made virtually all of her

arguments, and thus she adds little that has not already been the subject of a response in this brief.

In her "Argument," however, Sideman does raise the one issue that she saw fit to brief in the District Court -- the claim that in acting as she did in concert with the defendant public officials, she was exercising "her First Amendment rights," particularly her right to seek a redress of grievances. This claim is responded to in plaintiffs' initial brief. Suffice it to say here that it begs the question on this appeal. It seems clear that if a private citizen acts with a public official to commit a violation of the Civil Rights statutes, he may not be heard to say that either is protected by the First Amendment. Specifically, a private citizen can hardly claim that he is exercising his right to seek a redress of grievances from a public official if the subject matter of his discussions with the official is the selective prosecution of another citizen! Sideman virtually admits begging the question. Thus, she states: "We pass over the question whether such constitutionally protected activities may be overt acts in furtherance of an unlawful conspiracy" (Br., p. 6; plaintiffs' emphasis)!

Before concluding, Sideman makes one more claim never made in the District Court, this one addressed to plaintiffs'

damages. She states that plaintiffs allegedly suffered no damages because "their discotheque became unprofitable not because of the defendants' activities, but because the discotheque in its location could not operate successfully under the hours prescribed by the 'cabaret' ordinance" (Br., p. 6). She apparently fails to see that it was precisely because of "defendants' activities" that plaintiffs were forced to operate "under the hours prescribed by the 'cabaret' ordinance," so that "defendants' activities" were indeed the cause of plaintiffs' lack of success.

The cases cited at the end of the Sideman brief in support of the principle of summary judgment are strawmen. Plaintiffs do not attempt to argue that summary judgment may never be granted. They merely submit that this extreme relief may not be awarded when, as here, there are issues of fact.

Conclusion

THE JUDGMENT APPEALED FROM

SHOULD BE REVERSED.

Respectfully submitted,

BUTLER, JABLOW & GELLER
Attorneys for Plaintiffs-Appellants

Of counsel:
STANLEY GELLER

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RANDALL J. HARMS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5 UNIVERSITY PL. NEW YORK, N.Y..

That on the 3RD day of MARCH, 1976, deponent personally served the within REPLY BRIEF OF PLAINTIFFS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ZIMMER FISHBACH + HERTAN
ATTORNEYS FOR DEFENDANTS-APPELLEES
919 THIRD AVE.
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Randall J. Harms

Sworn to before me this
3rd day of March, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977